Koh Mui Tee (practising under the name and style Koh & Assoc) v Chin Lee & Ors and another appeal (the adminstrators of the estate Chin Kah Tan @ Tukan Chan, deceased)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–857 OF 2011 AND W-02–858 OF 2011
ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA
11 JULY 2014

C

Legal Profession — Disciplinary proceedings — Disciplinary board/committee — Appeal — Whether client agreed to contingency fee — Whether contingency fee was agreed to in letter of appointment — Whether disciplinary proceeding was flawed because testimony not given on oath — Whether disciplinary committee failed to comply with r 26(2) of the Legal Profession Rules (Proceedings of the Investigating Tribunal and Disciplinary Committee) 1994 — Whether disciplinary committee had jurisdiction to determine validity of fee agreement — Whether penalty of RM10,000 excessive — Whether professional misconduct established — Whether disciplinary proceedings was contrary to spirit and effect of settlement reached between parties — Whether appellant must file affidavit containing record of appeal — Whether disciplinary board can accept report submitted out of time — Whether extensions of time can be allowed by Disciplinary Board — Whether injustice caused to appellant by grant of extensions and delay — Legal Profession (Disciplinary-Proceedings) (Appeal) Rules 1994 r 5

D

E

F

Evidence — Oaths and affirmations — Omission of oath — Testimony before disciplinary committee not given on oath — Whether evidence invalidated by omission of oath — Whether omission of oath saved by s 12 of the Oaths and Affirmations Act 1949

G

The disputed fact, in this case, concerned a letter of appointment dated 23 December 1994 under which one Chin Kah Tan ('the client') appointed the appellant as his solicitor and on the face of it agreed to pay legal fees amounting to 25% of the market value of his property the subject of the litigation. According to the complainant, the space for contingency fee in the letter of appointment, which now showed '25%', had been left blank. The appellant on the other hand claimed that the 25% fee was agreed to in the letter of appointment. The litigation matter was settled in year 2000. The appellant refused to return the certificate of title to his client on the ground that a balance of the legal fee of 25% of the market value of the property remained unpaid. In 2002 the client lodged a complaint with the disciplinary board ('the DB')

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which appointed an Investigating Tribunal ('the IT'). Meantime, the client died on 19 February 2004. In its report dated 6 April 2007, the IT recommended that a formal investigation was unnecessary. The DB disagreed and referred the complaint to the disciplinary committee ('the DC'). On 21 February 2007, the appellant commenced *Guaman* No S6–22–188 of 2007 to recover his fees. An application to strike out the appellant's writ of summons and statement of claim was allowed. The Appellant's appeal to the Court of Appeal was withdrawn on 26 May 2010 by agreement in a consent order on 21 April 2010. On 15 May 2007, the appellant filed defamation suits, Suit No S3–23–41 of 2007 and Suit No 82–2340 of 2007 against the first and second respondents herein respectively. These were discontinued by the consent order of 21 April 2010. The appellant informed the DB and DC of the consent order. Nevertheless, the DB and DC continued with the disciplinary proceedings and found that the appellant had misconducted himself under s 94(3)(m) and (o) of the Legal Profession Act 1976 ('Act 166'). The appellant was said to have charged fees or costs which were grossly excessive. The DB imposed a fine of RM10,000. The appellant brought this appeal against the decision of the High Court dismissing his application against liability and penalty imposed by the DB. The appellant, inter alia, contended that: (i) the disciplinary proceeding was flawed and/or void because the testimony before the DC was not given on oath; (ii) the DC had failed to comply with r 26(2) of the Legal Profession Rules (Proceedings of the Investigating Tribunal and Disciplinary Committee) 1994 ('r 26(2)'). The DC had sought several extensions, the last extension being up to 29 September 2009. This was therefore the last date for the submission of the DC's report and the record of the investigation proceedings. The DC hearing was on 9 September 2009, which was within the extension given. But the report was submitted only on 15 June 2010, 8 1/2 months after the expiry of the last extension. The report was nevertheless accepted by the DB; (iii) the DC had no jurisdiction to determine the validity of the fee agreement; (iv) the penalty of RM10,000 was excessive; (v) the appellant had not committed any professional misconduct; and (vi) the disciplinary proceedings was contrary to the spirit and effect of the settlement. The appellant had served a notice of preliminary objection to the respondents on the grounds that they had failed to file an affidavit containing the record of appeal in accordance with r 5 of the Legal Profession (Disciplinary-Proceedings) (Appeal) Rules 1994 PU(A) 190/1994.

Held, dismissing the appeal:

(1) Although an oath was required, the omission was saved by s 12 of the Oaths and Affirmations Act 1949 which provides that proceedings and evidence not to be invalidated by omission of oath or irregularity. There was, therefore, no merit in the submission that the testimony of a witness to whom an oath had not been administered cannot sustain proof beyond reasonable doubt (see paras 18 & 21).

(2) The purpose of r 26(2) is to avoid delays. The two month time frame is not a hard and fast rule. The key point is that the report is completed and submitted as soon as possible so that the complaint can be dealt with on the merits. It is also not provided that the DB cannot accept a report that is submitted out of time. Extensions of time can be allowed by the DB. The DC is not a full time paid occupation, and the members have their own full time occupation from which they have to find the time to discharge their responsibilities as members of the DC. There was no contemporaneous evidence of objections or representations to the DB of any injustice caused to the appellant by the grant of extensions and delay in the disposal of the matter. At least part of the delay resulted from objections from the appellant. It would be wrong to apply the provision as a strict technical barrier providing a blanket protection for an advocate and solicitor the subject of a complaint by a client, unless it is shown that the delay caused an injustice to the advocate and solicitor. Thus, while the submission of the report on 15 June 2010 could have been rejected by the DB, its acceptance of the report amounted to a further extension being given to the date of acceptance (see paras 26–27).

(3) The DB and the DC well as the High Court were not wrong in taking into consideration that the complainant was illiterate. Where a client is illiterate, prudent counsel would ensure blank spaces are crossed out or filled in and the form and documents are signed in front of a witness (see para 35).

(4) Taking into consideration the justice of the case, there was no question the respondents were parties aggrieved, and the preliminary objection was merely as to the absence of the affidavit and not as to the completeness of the appeal record filed. Hence the appellant's preliminary objection was rejected (see para 75).

(5) The penalty of RM10,000 imposed by the DB was a small amount to counsel of the appellant's seniority, miniscule in comparison to the fee balance claimed of RM620,000 that the appellant had in the settlement forgone. The penalty of RM10,0000 was so out of proportion that it was an exceptional case for curial scrutiny and intervention. The courts have a supervisory role by its curial scrutiny that the DB exercises in a balanced manner its responsibility (see para 82–83).

(6) The magnitude of the fee in relation to the work required was so disproportionate that it was unlikely the complainant would have agreed. The insertion of the 25% of market value fee in a space left blank at the time of signing, as found, without the authority of the complainant who signed the letter could hardly be termed as not dishonest (see para 83).

[Bahasa Malaysia summary

Fakta yang dipertikaikan dalam kes ini adalah berkaitan surat pelantikan bertarikh 23 Disember 1994 di mana Chin Kah Tan ('anak guam itu') telah melantik perayu sebagai peguamcaranya dan atas dasar tersebut bersetuju untuk membayar fi guaman berjumlah 25% daripada nilai pasaran hartanahnya, subjek litigasi tersebut. Menurut pengadu, ruang untuk fi kontingensi dalam surat pelantikan tersebut, yang sekarang menunjukkan 25%, telah dibiarkan kosong. Perayu sebalikya mendakwa bahawa fi 25% telah dipersetujui dalam surat pelantikan tersebut. Perkara litigasi telah diselesaikan pada tahun 2000. Perayu enggan memulangkan sijil hakmilik kepada pelanggannya atas alasan bahawa baki fi guaman 25% daripada nilai pasaran hartanah tersebut masih belum dibayar. Pada tahun 2002 anakguam tersebut telah membuat aduan kepada lembaga tatatertib ('LT') yang melantik tribunal siasatan ('TS'). Sementara itu, pelanggan telah meninggal dunia pada 19 Februari 2004. Dalam laporannya bertarikh 6 April 2007, TS menyarankan agar siasatan formal tidak diperlukan. LT tidak bersetuju dan merujuk aduan tersebut kepada jawatankuasa tatatertib ('JT'). Pada 21 Februari 2007, perayu telah memulakan Guaman No S6–22–188 Tahun 2007 untuk mendapat balik finya. Permohonan untuk membatalkan writ guaman dan pernyataan tuntutan perayu telah dibenarkan. Rayuan perayu kepada Mahkamah Rayuan telah ditarik balik pada 26 Mei 2010 melalui perjanjian dalam perintah persetujuan pada 21 April 2010. Pada 15 Mei 2007, perayu telah memfailkan guaman-guaman fitnah, Guaman No S3–23–41 Tahun 2007 dan Guaman No 82–2340 Tahun 2007 terhadap responden pertama dan kedua. Kedua-dua guaman tidak diteruskan melalui perintah persetujuan 21 April 2010. Perayu telah memberitahu LT dan JT tentang perintah persetujuan tersebut. Walau bagaimanapun, LT dan JT telah meneruskan dengan prosiding tatatertib dan mendapati perayu telah salah laku di bawah s 94(3)(m) dan (o) Akta Profesyen Undang-undang 1976 ('Akta tersebut'). Perayu dikatakan telah mengenakan fi atau kos yang berlebihan. LT telah mengenakan denda RM10,000. Perayu telah memulakan rayuan ini terhadap keputusan Mahkamah Tinggi yang menolak permohonannya terhadap liabiliti dan penalti yang dikenakan oleh LT. Perayu, antara lain, berhujah bahawa: (i) prosiding tatatertib itu cacat dan/atau terbatal kerana keterangan di hadapan JT tidak diberikan atas sumpah; (ii) JT telah gagal mematuhi k 26(2) Kaedah-Kaedah Profesyen Undang-Undang (Prosiding Tribunal Siasatan dan Jawatankuasa Tatatertib) 1994 ('k 26(2)'). JT telah memohon beberapa lanjutan masa, lanjutan masa terakhir adalah pada 29 September 2009. Ia adalah tarikh terakhir untuk mengemukakan laporan JT dan rekod prosiding siasatan. Perbicaraan JT adalah pada 9 September 2009, yang mana adalah dalam lanjutan yang diberikan. Namun laporan tersebut hanya dikemukakan pada 15 Jun 2010, lapan bulan setengah selepas tamat tempoh lanjutan terakhir. Laporan tersebut telah diterima oleh LT; (iii) JT tiada bidang kuasa untuk menentukan kesahan perjanjian fi; (iv) penalti RM10,000 adalah berlebihan; (v) perayu tidak

melakukan apa-apa salah laku profesional; dan (vi) prosiding tatatertib adalah bertentangan dengan semangat dan kesan penyelesaian. Perayu telah menyampaikan notis bantahan awal kepada responden atas alasan bahawa mereka telah gagal untuk memfailkan afidavit yang mengandungi rekod rayuan menurut k 5 Kaedah-Kaedah Profesion Undang-Undang (Prosiding Tatatertib) (Rayuan) 1994 PU(A) 190/1994.

Diputuskan, menolak rayuan:

(1) Walaupun sumpah diperlukan, peninggalannya diselamatkan oleh s 12 Akta Sumpah dan Ikrar 1949 yang memperuntukkan bahawa prosiding dan keterangan tidak patut dijadikan tidak sah oleh sebab peninggalan sumpah atau luar aturan. Oleh itu tiada merit dalam penghujahan bahawa testimoni saksi yang mana sumpah tidak dibuat tidak boleh mengekalkan bukti melampaui keraguan munasabah (lihat perenggan 18 & 21).

(2) Tujuan k 26(2) adalah untuk mengelakkan kelewatan. Tempoh masa dua bulan bukan peraturan yang ketat. Perkara utama adalah bahawa laporan tersebut siap dan dikemukakan secepat mungkin agar aduan boleh diteliti atas merit. Ia juga tidak diperuntukkan bahawa LT tidak boleh menerima laporan yang dikemukakan di luar masa. Lanjutan masa boleh dibenarkan oleh LT. JT bukan pekerjaan yang dibayar sepenuh masa, dan ahli-ahli mempunyai pekerja tetap mereka sendiri yang mana mereka mencuri masa untuk melaksanakan tanggungjawab mereka sebagai ahli-ahli JT. Tiada keterangan semasa tentang bantahan atau representasi kepada LT berhubung apa-apa ketidakadilan yang disebabkan kepada perayu dengan pemberian lanjutan masa dan kelewatan dalam menyelesaikan perkara tersebut. Sekurang-kurangnya sebahagian daripada kelewatan tersebut adalah akibat bantahan daripada perayu. Adalah salah untuk menggunakan peruntukan tersebut seperti penghalang teknikal yang tegas, yang memberikan perlindungan menyeluruh untuk peguambela dan peguamcara berkenaan subjek aduan oleh pelanggan, kecuali dapat ditunjukkan bahawa kelewatan itu disebabkan oleh ketidakadilan kepada peguambela dan peguamcara itu. Oleh itu, jika pun laporan yang dikemukakan pada 15 Jun 2010 mungkin boleh ditolak oleh LT, penerimaannya terhadap laporan tersebut menjadi lanjutan selanjutnya yang diberikan pada tarikh penerimaan (lihat perenggan 26–27).

(3) LT dan JT dan juga Mahkamah Tinggi tidak salah dalam mengambil kira bahawa pengadu seorang buta huruf. Di mana anak guam adalah seorang buta huruf, peguam yang bijak akan memastikan ruang kosong itu dipangkah atau diisi dan borang dan dokumen itu ditandatangani di hadapan saksi (lihat perenggan 35).

(4) Dengan mengambil kira keadilan kes, tidak dipersoalkan

responden-responden adalah pihak-pihak yang terkilan, dan bantahan awal hanya untuk ketiadaan afidavit dan bukan untuk kelengkapan rekod rayuan yang difailkan. Justeru bantahan awal perayu ditolak (lihat pereggan 75).

(5) Penalti RM10,000 yang dikenakan oleh LT adalah jumlah kecil untuk peguam perayu yang berpengalaman, amat sedikit dibandingkan dengan baki fi RM620,000 yang dituntut perayu yang mana telah diketepikan dalam penyelesaian tersebut. Denda RM10,000 tidak berpatutan yang mana ia adalah kes luar biasa untuk penelitian dan campur tangan. Mahkamah mempunyai peranan penyeliaan melalui penelitian terperincinya agar LT melaksanakan tanggungjawabnya dengan cara yang seimbang (lihat perenggan 82–83).

(6) Jurang besar fi berkaitan kerja yang diperlukan amat tidak seimbang sehingga tidak mungkin pengadu telah bersetuju dengannya. Kemasukan 25% daripada fi nilai pasaran dalam ruang yang ditinggalkan kosong pada masa tandatangan, seperti didapati, tanpa kebenaran pengadu yang menandatangani surat itu tidak langsung boleh dianggap sebagai tidak jujur (lihat perenggan 83).]

Notes

For cases on disciplinary board/committee, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1490–1493.

Cases referred to

An Advocate and Solicitor, In Re [1950] 1 MLJ 113 (refd)
Attorney-General of The Gambia v N'jie [1961] 2 All ER 504, PC (refd)
Au Kong Weng v Bar Committee, Pahang [1980] 2 MLJ 89, FC (refd)
Bolton v Law Society [1994] 1 WLR 512, CA (refd)
College of Dental Surgeons v Dr Findlay 2000 BCTC Lexis 1574; [2000] BCSC 1311, SC (refd)
Cook v Southend Borough Council [1990] 1 All ER 243, CA (refd)
Folin & Brothers Sdn Bhd (in liquidation) v Wong Boon Sun & Ors and another appeal [2009] 5 MLJ 362; [2010] 4 CLJ 64, CA (refd)
Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341, CA (refd)
Jerald Allen Gomez v Shencourt Sdn Bhd (Majlis Peguam, intervernor) [2006] 2 MLJ 343; [2006] 1 CLJ 88, HC (not folld)
Keith Sellar v Lee Kwang Tennakoon v Lee Kwang [1980] 2 MLJ 191; [1980] 1 LNS 36, FC (not folld)
Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor [2008] 4 MLJ 1, FC (refd)
Marzaini bte Zainuddin v Majlis Peguam Negara [2007] 8 MLJ 697, HC (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, FC (refd)

Sujplass Sdn Bhd v Suison Sdn Bhd [2009] 9 MLJ 581; [2009] 1 LNS 894, HC (refd)
Trikkon Sdn Bhd v Dato Mahinder Singh Dulku (practising at Messr Mahinder Singh Dulku & (O) [2010] 8 MLJ 239; [2008] 1 LNS 786, HC (folld)
Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor [1999] 5 MLJ 180; [1998] 1 LNS 363, HC (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 40
Legal Profession Act 1976 ss 93, 94(3), 94(3)(m), (o), 99, 100(1), 101, 102, 102(2)(b), 102(3), 103A, 103C, 103D, 103E, 103F, 116, 118
Legal Profession (Disciplinary-Proceedings) (Appeal) Rules 1994 rr 1A, 5, 10
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 r 26, 26(2), (3)
Oaths and Affirmations Act 1949 s 12
Rules of the High Court 1980 O 41 r 11(1)

Appeal from: Originating Motion No R3 (R2)-17–75 of 2010 (High Court, Kuala Lumpur)

KH Yeap (Koh & Assoc) for the appellant.
WP Leong (WP Leong & Partners) for the respondents.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] Civil Appeals W-02–857 of 2011 and W-02–858 of 2011 were heard together.

[2] Civil Appeal W-02–857 of 2011 is an appeal by Koh Mui Tee, the appellant herein, against the decision of the High Court on 24 November 2011 dismissing his application in Originating Motion No R3(R2)-17–75 of 2010 against liability and penalty imposed and for various orders against the decision made on 23 July 2010 by the disciplinary board set up under s 93 of the Legal Profession Act 1976 ('Act 166').

CIVIL APPEAL W-02–857 OF 2011

[3] The disciplinary board had on 23 July 2010 agreed with the finding by the disciplinary committee of misconduct, which term is defined in s 94(3) of Act 166 to mean conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety, and which includes, in respect of the appellant, under s 94(3)(m) and (o) of Act 166 the following conduct:

(m) the charging, in the absence of a written agreement, in respect of professional services rendered to a client, of fees or costs which are grossly excessive in all the circumstances;

(o) being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

[4] The disciplinary board imposed a fine of RM10,000.

[5] Dissatisfied with the decision of the disciplinary board, the appellant filed an appeal to the High Court by way of an Originating Summons R2–17–75 of 2010 pursuant to s 103E of Act 166 on 3 September 2010. The appeal, as amended on 13 October 2010, sought orders to set aside the findings and the penalty imposed on grounds which may be summarised as follows:

(a) there is no merit in the complaint;

(b) the complaint is scandalous, frivolous or vexatious, and otherwise an abuse of the process of the court;

(c) the report and recommendations of the investigating tribunal dated 6 April 2007 that a formal investigation is not necessary is correct;

(d) disciplinary proceedings of the disciplinary committee on 9 September 2009 is null and void;

(e) the disciplinary committee erred when it made the finding that there was merit in the complaint and recommended that the appellant be suspended from practice for six months;

(f) the disciplinary board erred in affirming the findings of the disciplinary committee on liability; and

(g) the disciplinary committee erred in imposing a penalty of RM10,000, which ought to be set aside or reduced.

[6] The findings of fact of the disciplinary committee and the disciplinary board pertain to a disputed fact as to whether the complainant had agreed to pay a contingency fee of 25% of the market value of the property. The versions are as follows:

(a) complainant's version: that the agreed legal fee was RM30,000, that it was paid, and when the complainant signed the letter of appointment:

(i) the complainant had not agreed to a fee amounting to 25% of the market value of the subject property; and

(ii) the space for contingency fee, which now shows the 25%, had been left blank,

(b) The appellant's version: the 25% fee was agreed to in the letter of appointment.

[7] The grounds of judgement dated 20 April 2011 of the High Court show that the learned judge addressed her mind to the findings by the disciplinary committee and the disciplinary board, and taking into consideration the facts of the case as well as the generally accepted principle that the court would not lightly intervene in findings of disciplinary boards of professional bodies, found no reason to intervene and set aside the findings of the disciplinary committee and the disciplinary board. The High Court dismissed the appellant's appeal.

[8] Dissatisfied with the decision of the High Court, the appellant appealed to this court.

OBSERVATIONS

[9] The disputed fact, in this case, concerns a letter of appointment dated 23 December 1994 under which one Chin Kah Tan @ Tu Kah Chan ('the client') appointed the appellant as his solicitor and on the face of it agreed to pay legal fees amounting to 25% of the market value of his property the subject of the litigation. The litigation matter was settled in year 2000. The appellant refused to return the certificate of title to his client on the ground that a balance of the legal fee of 25% of the market value of the property remained unpaid. The matter of the fee remained unresolved. In the year 2002, the client lodged a complaint with the disciplinary board which appointed an investigating tribunal. Meantime, the client died on 19 February 2004.

[10] The proceedings of the investigating tribunal began on 16 November 2005, and was continued on 21 November 2005, 5 December 2006, 7 December 2006 and 10 January 2007. In its report dated 6 April 2007, it recommended that a formal investigation was unnecessary. The disciplinary board, by letter 21 June 2007, informed the appellant of its decision that it disagreed and referred the complaint to the disciplinary committee.

[11] On 21 February 2007, the appellant commenced Suit No S6–22–188 of 2007 to recover his fees. A summons-in-chambers was filed by the appellant to test the validity of the fee agreement and was dismissed by the High Court on 25 June 2009. At the same time, an application to strike out the appellant's writ of summons and statement of claim was allowed with costs. The appellant's appeal to the Court of Appeal was withdrawn on 26 May 2010 by agreement in a consent order on 21 April 2010.

[12] On 15 May 2007, the appellant filed defamation suits, Suit No S3–23–41 of 2007 and Suit No 82–2340 of 2007 against the first and second respondents herein respectively. These were discontinued by the consent order of 21 April 2010.

[13] Under the consent order of 21 April 2010, it was agreed:

> Pihak-pihak hendaklah memaklumkan lembaga tatatertib dan jawatankuasa disiplin mengenai penyelesaian damai semua pertikaian sivil tersebut.

[14] The appellant informed the disciplinary board and the disciplinary committee of the consent order. But although so informed, the disciplinary committee and the disciplinary board continued with the disciplinary proceedings and made the findings and order referred to in paras (2)–(3) above.

[15] The following issues were addressed in the submissions for the appellant. We address these under the following headings.

The disciplinary proceeding is flawed and/or void

[16] The testimony before the disciplinary committee was not given on oath. It was submitted that since the function of the disciplinary committee is quasi judicial in nature, and the testimony stage of the proceedings is of crucial importance (see *Jerald Allen Gomez v Shencourt Sdn Bhd (Majlis Peguam, intervernor)* [2006] 2 MLJ 343; [2006] 1 CLJ 88) as it could mean the end of a person's career, the failure to conduct the examination on oath renders the proceedings flawed or void.

[17] It is said that the purpose of an oath or affirmation is to administer a gentle reminder to the witness that he is required to tell the truth and nothing but the truth. In a profession where skills and knowledge in the name of justice are offered not altruistically, but for payment of money, there may be the thought that there is temptation to overlook it. The oath or affirmation serves also to remind lawyers not to expect the witness to tell other than the truth. That reminder serves as the basis for legal action, even punishment, if it turns out later that he had not told the truth. It ensures that his testimony, tested and assessed on credibility, is safe to be relied upon in making a decision that affects a person's right to life, liberty and property. We do not accept the submission by the respondents that an oath is not required merely on the grounds there is no provision to require it in the Act 166.

[18] Although we hold that an oath is required, the omission is saved by another legislation. Section 12 of the Oaths and Affirmations Act 1949 (Revised 1977) ('Act 194') provides that proceedings and evidence not to be

invalidated by omission of oath or irregularity:

> 12 No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

[19] Section 12 does not entertain the notion that a witness can be excused from telling the truth. The duty to be truthful is unqualified. In other words, any person coming forward as a witness in any proceeding, be it in a court of law or any tribunal, where the rights of another may be affected is obliged to state the truth, and whether or not an oath or affirmation was administered, that other person whose rights is affected by anything not truthful in the witness's testimony can take legal action against the witness.

[20] We observe that in the light of s 12, an objection to a witness's clarification on the grounds he had not been asked cannot stand. Be that as it may, the absence of a specific mandatory requirement in Act 166 for an oath to be administered simply means that the operation of s 12 of Act 194 is preserved.

[21] There is, therefore, no merit in the submission that the testimony of a witness to whom an oath had not been administered cannot sustain proof beyond reasonable doubt.

[22] We, therefore, dismiss this part of the submission for the appellant.

Failure by the disciplinary committee to comply with r 26(2) of the Legal Profession Rules (Proceedings of the Investigating Tribunal and Disciplinary Committee) 1994

[23] Section 103F of Act 166 gives power to make rules. In exercise of this power, the disciplinary board made the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 (PU(A) 189 of 1994). Rule 26 provided as to the report of disciplinary committee to the disciplinary board. Sub-r (2)–(3) thereof provides in clear and specific terms:

> (2) The report of the Disciplinary Committee together with the record of the investigation proceedings shall be sent to the Director within two months from the date of the appointment of the Disciplinary Committee.

(3) The period prescribed in subrule (2) may, upon an application in writing made by the chairman of the Disciplinary Committee, be extended by the chairman of the Disciplinary Board if there exists reasonable grounds to do so.

[24] Addressing this issue, Messrs Thevin, Chandran & Assoc appearing for the disciplinary board, produced letters from the chairman of the disciplinary committee seeking extension of time dated 2 August 2007, 15 January 2008, 10 June 2008, 6 August 2008, 24 March 2009 and 14 July 2009 and the corresponding grant of extensions until 29 September 2009 by letters 3 August 2007, 29 January 2008, 13 June 2008, 25 August 2008, 2 April 2009, and 21 July 2009.

[25] There is no evidence of further extensions being given after 29 September 2009. It is, therefore, the last date for the submission of the report of the disciplinary committee and the record of the investigation proceedings. The hearing by the disciplinary committee was on 9 September 2009. That is within the extension given. But the report was submitted only on 15 June 2010, 8 1/2 months after the expiry of the last extension. The report was accepted by the disciplinary board.

[26] The purpose of the sub-rule is to avoid delays. The two month time frame is not a hard and fast rule. The key point is that the report is completed and submitted as soon as possible so that the complaint can be dealt with on the merits. It is also not provided that the disciplinary board cannot accept a report that is submitted out of time. Extensions of time can be allowed by the disciplinary board. We take into consideration that the disciplinary committee is not a full time paid occupation, and the members have their own full time occupation from which they have to find the time to discharge their responsibilities as members of the disciplinary committee. There is no contemporaneous evidence of objections or representations to the disciplinary board of any injustice caused to the appellant by the grant of extensions and delay in the disposal of the matter. Indeed, it appears that at least part of the delay resulted from objections from the appellant.

[27] We conclude it would be wrong to apply the provision as a strict technical barrier providing a blanket protection for an advocate and solicitor the subject of a complaint by a client, unless it is shown that the delay caused an injustice to the advocate and solicitor. Otherwise the protection given to the public that clients of advocates and solicitors can take their complaints of misconduct to a professional forum becomes illusory. The disciplinary board is authorised to grant extensions at any time, and is entitled to accept a report submitted out of time. Thus, while the submission of the report on 15

June 2010 could have been rejected by the disciplinary board, its acceptance of the report amounts to a further extension being given to the date of acceptance.

[28] We, therefore, dismiss this part of the submission for the appellant.

Recommendation of the investigating tribunal

[29] It was submitted for the appellant that:

> 4.1 Hakim Mahkamah Tinggi telah tersilap dari segi undang-undang dan/atau fakta-fakta apabila mengambil-kira fakta bahawa Tribunal Siasatan telah membuat keputusan atau cadangan yang betul apabila mengesyorkan dalam lapurannya yang bertarikh 6 April 2007 ('Lapuran Tribunal Siasatan tersebut') bahawa siasatan formal adalah tidak perlu, dan memahami rasional keputusan Tribunal Siasatan secara wajar dan betul (sila lihat m/s 156–312 rekod rayuan).

[30] In context, para 4.1 must have been carelessly written. The submission referred to the finding of facts of the investigating tribunal, and cited the following therefrom:

> The tribunal is of the view that the letter documenting the fee arrangement is genuine although the original copy of the letter was not produced before the investigating tribunal. There was no challenge by the complainant of the validity of the letter or the veracity of its contents at the hearings before the investigative tribunal.
>
> There is a contention in the letter of complaint dated 20 February 2002 ('the complaint') that the complainant's sons cannot read or write english and bahasa malaysia and that the letter was handed over to them for the complainant to sign. There is no contention that the complainant himself cannot read or write english although the statutory declaration verifying the complaint (made on 21 February 2002 and seen at page 4 of the record of compliant) states that it was translated by the Commissioner for Oaths and thus implies that the complainant was not literate in the English language.
>
> Nevertheless, there is no contention that the letter was not signed by the complainant. Furthermore, the Letter is dated 23 December 1994 and the complaint is dated 20 February 2002. There was more than ample time for the complainant to find out the meaning of the letter if indeed he did not understand it in the first place. He was obviously in a position to seek clarification if he could instruct the numerous solicitors who acted on his behalf.
>
> On reading the letter, it is evident that there is an agreement for quantum of fees and this is permissible in law. The law also provides for the exercise of a lien over the documents of the client by a solicitor until his fees are paid.
>
> It is therefore the unanimous view of this investigating tribunal that there was a fee agreement and as such the respondent is not guilty of any misconduct by relying on his lien and withholding the document of title until his fees are fully paid.

[31] Having done so, the only point made is, it was a unanimous finding.

[32] Taking into consideration that s 102(2)(b) of Act 166 has provided that if the investigating tribunal in its report recommended that a formal investigation by a disciplinary committee is not necessary, the disciplinary board may, if it disagrees with the recommendation, appoint a disciplinary committee, without excepting a unanimous recommendation by the investigating tribunal, the disciplinary board was entitled to reject the recommendation of the investigating tribunal and appoint a disciplinary committee.

[33] We dismiss this part of the submission for the appellant.

The disciplinary committee has no jurisdiction to determine the validity of the fee agreement

[34] The submission would emasculate the disciplinary committee from carrying out its functions. The reasoning that this follows from the fact that s 116 of Act 166 provides that an advocate and solicitor may enter into an agreement for costing in contentious cases is flawed. The section provides:

> (1) Subject to the provisions of any written law, an advocate and solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to be done by such advocate and solicitor, either by a gross sum, or otherwise, and either at the same rate or at a greater or lesser rate than the rate at which he would otherwise be entitled to be remunerated.
>
> (2) Every such agreement shall be signed by the client and shall be subject to this Part.

[35] It was submitted that a dispute as to bill of costs is dealt with under s 116 and/or s 118 of Act 166 before the court and that the disciplinary board and the disciplinary committee are not the forums to determine the validity of the fee agreement. The submissions glosses over the fact that the complaint is not as to the percentage of the fee or whether a fee agreement can be entered into, but the issue before the disciplinary board and the disciplinary committee concerns the conduct of the appellant in allegedly inserting the fee of 25% of market value when that space was left blank. We do not think that the disciplinary board and the disciplinary committee as well as the High Court were wrong in taking into consideration that his client and complainant was illiterate. In our view, in such cases where a client is illiterate, prudent counsel would ensure blank spaces are crossed out or filled in and the form and documents are signed in front of a witness.

[36] The reliance upon *Trikkon Sdn Bhd v Dato Mahinder Singh Dulku (practising at Messr Mahinder Singh Dulku & (o)* [2010] 8 MLJ 239; [2008] 1 LNS 786 to support the submission is desperately flawed. In that case, the High Court at para 9 quoted the decision of Thomson J (as he then was) in *In Re, an Advocate and Solicitor* [1950] 1 MLJ 113 at p 116 where it was held:

> In the circumstances, I propose to say that the acts found by the committee do not make out the offence of grossly improper professional conduct or any other offence under s 26. What these findings amount to is that there has been a breach of contract on the part of AB. The penalty imposed by the courts for breach of contract is damages and costs and I can find no authority for saying that where the party in breach of a contract is a solicitor he would be subject to punishment for improper conduct unless it is clearly found that the breach has been attended by some circumstance of dishonesty.

[37] The qualification was made 'unless it is clearly found that the breach has been attended by some circumstance of dishonesty'. The allegation in this case pertains directly to an allegation of an act or circumstance of dishonesty where a space left blank was dishonestly filled in by the appellant to allow for himself a fee of 25% of the market value of the client's property. That case is of no assistance to the appellant.

[38] For completeness, we refer to s 40 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) Act 388 which provides:

> (1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

[39] The language of the section is sufficiently wide to invest the disciplinary board and the disciplinary committee to hear, determine or rule upon any issue raised in the course of disciplinary proceedings conducted before them. Otherwise, a party may turn disciplinary proceedings into a charade and prevent a decision on the complaint by the simple devise of making objections masqueraded as questions of jurisdiction as well as other demands. The proper conduct is for the disciplinary board and the disciplinary committee hear and make its ruling, and if the ruling affects the final decision and the party is dissatisfied with the decision, that party may appeal against the decision under s 103E of Act 166 and raise the ruling as a ground.

[40] In our view, the failure or inability to distinguish between a ruling that provides a ground of appeal, and a decision which is appealed upon is a cause of interlocutory appeals that add massively to the normal appeals, and where

entertained, is the cause of many delays in the disposal of cases on their merits. Indeed, it may be exploited by a defendant for the very purpose of delaying the day of judgement.

[41] We, therefore, dismiss this part of the submission for the appellant.

No merit in the deceased's complaint in relation to the fee agreement

[42] The submission that the 25% fee is not a contingency fee is irrelevant because the question is the appellant's alleged misconduct of filling in the 25% in a space that had been left blank. That the complainant Chin Kah Tan @ Tu Kah Chan signed voluntarily is equally irrelevant, since his complaint is that the space was left blank when he did so. Whether the fee of 25% was reasonable or not is entirely separate from the question whether the Appellant inserted the 25% without the authority of the complainant Chin Kah Tan @ Tu Kah Chan. Hence, 'non est factum!' does not arise.

[43] It was submitted that:

> (m) Beban membukti (burden of proof) untuk prosiding tatatertib adalah pada tahap melampaui keraguan yang munasabah (beyond reasonable doubt) sila lihat kes *Keith Sellar v Lee Kwang* [1980] 2 MLJ 191 (m/s 79 Ikatan Autoriti Perayu). Jawatankuasa Disiplin telah menolak penjelasan dan keterangan lisan Perayu dan menerima penjelasan atau keterangan lisan daripada Responden.

[44] In *Keith Sellar v Lee Kwang Tennakoon v Lee Kwang* [1980] 2 MLJ 191; [1980] 1 LNS 36 (FC), the Federal Court established that in every allegation of professional misconduct involving an element of deceit or moral turpitude, a high standard of proof is called for and the standard of proof is proof beyond reasonable doubt.

[45] The submissions, however, is substantially only that the disciplinary committee rejected the appellant's testimony and explanation and accepted the respondents' testimony and explanation, and it appears the disciplinary committee accepted counsel's evidence from the bar. It only reiterates the appellant's own version that both the disciplinary board and the disciplinary committee erred in not accepting it. This clearly is the wrong test. The submissions did not demonstrate how that standard of proof beyond reasonable doubt failed to be applied. In our view, it is clear that the appellant had failed to raise a reasonable doubt in the minds of senior and experienced members of the bar in both the disciplinary board and the disciplinary committee.

[46] We, therefore, dismiss this part of the submission for the appellant.

Ulterior motive in the deceased's complaint

[47] It was submitted that the High Court erred when it failed to:

> mengambil-kira atau membuat dapatan bahawa Aduan tersebut adalah mengaibkan, remeh atau menyusahkan atau merupakan suatu penyalahan prosiding tatatertib, dan telah dilakukan dengan tujuan tunggal dan niat terselindung (*ulterior motive*) untuk memaksa Perayu untuk memulangkan dokumen hakmilik tersebut kepada Simati/Responden-Responden tanpa membayar baki yuran guaman yang telah dipersetujui melalui Surat Perjanjian Yuran Guaman tersebut.

[48] Upon consideration of the submission, it occurred to us that seeking to obtain the document of title without having to pay an allegedly agreed fee and seeking payment upon the alleged fee agreement are two equal sides of the same coin. We dismiss it as it glosses over the real dispute, which is the question whether the complainant Chin Kah Tan @ Tu Kah Chan who was illiterate signed with the space for the fee left blank and that the 25% was inserted without the complainant's agreement.

[49] We, therefore, dismiss this part of the submission for the appellant.

Disciplinary board has no jurisdiction to determine the validity of the fee agreement

[50] This has been dealt with earlier above in respect of the disciplinary committee.

[51] We dismiss this part of the submission for the appellant.

Penalty of RM10,000 is excessive and ought to be set aside

[52] The subject of inadequacy of the penalty is the subject of Civil Appeal W-02–858 of 2011. We will address the appellant's submission together with the respondents' submissions in Civil Appeal W-02–858 of 2011.

The appellant had not committed any professional misconduct and other grounds

[53] It suffices to say that both the disciplinary board and the disciplinary committee found that misconduct was proved and the submission is a general statement of the appellant's position:

> 10.1 Berdasarkan perkara-perkara di atas, perayu tidak melakukan sebarang salah laku profesional atau apa jua salah laku atau ketidakpatutan sekalipun dan oleh itu perayu tidak patut disabitkan dari segi liabiliti dan tiada hukuman patut dikenakan ke atas perayu.

[54] It is, therefore, unnecessary to address it separately.

[55] We dismiss this part of the submission for the appellant.

Continuation of the disciplinary proceedings by the respondents is contrary to the spirit and effect of the settlement

[56] We address this issue last so that it can be considered on its own without the shadow or distraction of the other issues raised.

[57] It was submitted for the appellant that the disciplinary proceedings ought to be discontinued because all the disputes between the appellant and the respondents were settled under the consent order of 21 April 2010. In other words, the submission is that the respondents are estopped from proceeding with the disciplinary proceedings before the disciplinary committee and the disciplinary board.

[58] In our view, the submission requires an examination of the relevant sections of Act 166 as to complaints against an advocate and solicitor and disciplinary proceedings.

[59] Section 99 of Act 166 provides as to complaints against an advocate and solicitor or pupil:

> 99(1) Any complaint concerning the conduct of any advocate and solicitor or of any pupil shall be in writing and shall in the first place be made or referred to the Disciplinary Board which shall deal with such complaint in accordance with such rules as may from time to time be made under this Part.

[60] Act 166 thus provides that a complaint is to be referred to the disciplinary board. Then s 100(1) provides that the disciplinary board shall, if it considers that there is merit in the application or complaint, forthwith constitute an investigating tribunal. Section 101 provides that an investigating tribunal shall investigate into the application or complaint and report its findings to the disciplinary board. Section 102 provides that the investigating tribunal shall make a determination and recommend whether a formal investigation is not necessary or, inter alia, that there should be a formal investigation by a disciplinary committee. Section 102(3) provides that if the investigating tribunal in its report recommends that a formal investigation by a disciplinary committee is not necessary, the disciplinary board may, if it disagrees with the recommendation, appoint a disciplinary committee. Section 103A provides that where the disciplinary board determines that there should be a formal investigation, the disciplinary board shall forthwith appoint a disciplinary committee which shall hear and investigate the matter. Section

103C provides that after hearing and investigating any matter referred to it, a disciplinary committee shall record its findings in relation to the facts of the case and according to those facts shall determine and make its recommendations to the disciplinary board, and s 103D provides that the disciplinary board makes its order after considering the recommendations of the disciplinary committee.

[61] The above demonstrates clearly that once a complaint is made concerning the conduct of any advocate and solicitor, the matter is out of the complainant's hands. The statute prescribed the steps and responsibilities of the disciplinary board, the investigating tribunal and the disciplinary committee. Then given the provision of s 12 of Act 194, the respondents are obliged to tell the truth.

[62] In our view, the consent order of 21 April 2010 agreed to by the parties is entirely correct in not providing for a withdrawal of any action by the respondents before the disciplinary board and the disciplinary committee, for obviously there is no such thing, but only that the appellant and the respondents herein would write to the disciplinary board with copy to the disciplinary committee, for information only, that all civil proceedings between the appellant and the respondents herein were settled.

[63] We, therefore, dismiss this ground of appeal.

[64] We proceed to consider Civil Appeal W-02–858 of 2011.

CIVIL APPEAL W-02–858 OF 2011

[65] Civil Appeal W-02–858 of 2011 comprises appeals by:

(a) Koh Mui Tee, the appellant herein, against the decision of the High Court on 28 February 2011 to dismiss his application in Originating Motion No R3(R2)-17–72 of 2010 against the penalty imposed and for various orders against the decision made on 23 July 2010 by the disciplinary board set up under s 93 of the Legal Profession Act 1976 (Act 166); and

(b) Chin Lee and three others, the respondents herein, against the penalty imposed by the disciplinary board.

[66] Before the hearing of Originating Motion No R3(R2)-17–72 of 2010, the appellant had served a notice of preliminary objection to the respondents on the grounds that they had failed to file an affidavit containing the record of appeal in accordance with r 5 of the Legal Profession (Disciplinary-Proceedings) (Appeal) Rules 1994 PU(A) 190 of 1994. The rule

provides:

> (1) Within six weeks of the receipt of the documents specified under subrule 4(4), the appellant shall file an affidavit which contains the appeal record in the High Court.
>
> (2) A copy of the affidavit which contains the appeal record shall be served by personal service, courier or registered post to the respondent, the Director and the Bar Council.

[67] It is undisputed that the record of appeal was filed before the High Court. The objection is not that it was incomplete or contained other than what should have been in a record of appeal for the purposes of the appellant's appeal to the High Court, but that:

(a) no affidavit containing the appeal record was filed; and

(b) no application was made to file such an affidavit out of time.

[68] We directed the parties to proceed with the appeals and we would rule upon the preliminary objection later. We do so now.

[69] In pursuing the objection in this appeal, it was submitted, relying on *Sujplass Sdn Bhd v Suison Sdn Bhd* [2009] 9 MLJ 581; [2009] 1 LNS 894 that the use of the word 'shall' shows it is intended that the affidavit is mandatory.

[70] Counsel for the appellants also referred to O 41 r 11(1) of the Rules of the High Court 1980 which provides that 'Any document to be used in conjunction with an affidavit must be exhibited and a copy thereof annexed to the affidavit'. Thus because 'must' is used, it was submitted, relying on *Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor* [1999] 5 MLJ 180; [1998] 1 LNS 363 and *Folin & Brothers Sdn Bhd (in liquidation) v Wong Boon Sun & Ors and another appeal* [2009] 5 MLJ 362; [2010] 4 CLJ 64 (CA) that it is mandatory.

[71] In providing for appeals from the decision or order of the disciplinary board, s 103E of Act 166 provides that 'Any person aggrieved' may do so. The meaning to be given to the term 'Any person aggrieved' was considered by the Federal Court in *Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor* [2008] 4 MLJ 1 (FC). It was held by Augustine Paul J that the meaning to be accorded to the expression 'person aggrieved' would depend on the context of the purpose and provision of the statute in question. His Lordship explained that the rationale underlying the wider interpretation of the expression 'person aggrieved' to give statutory tribunals the right of appeal is to protect the public interest which they were duty bound to uphold. His Lordship referred to the decision of the Supreme Court of British Columbia in *College of Dental Surgeons v Dr Findlay* 2000 BCTC Lexis 1574; [2000] BCSC 1311, which relied upon the decisions of Lord Denning in *Attorney-General of The Gambia*

v N'jie [1961] 2 All ER 504, and of Lord Justice Woolf in *Cook v Southend Borough Council* [1990] 1 All ER 243.

[72] In our view, the necessity to show that an appellant is a person aggrieved requires that the facts in support thereof be verified by the affidavit. In this case, such verification is unnecessary as the respondents were the respondents named by the appellant in his Originating Motion No R3(R2)-17–72 of 2010, and they are the administrators of the estate of the complainant Chin Kah Tan @ Tu Kah Chan, the deceased.

[73] Counsel's reference to O 41 r 11(1) of the Rules of the High Court 1980 no doubt relies upon r 10 of PU(A) 190 of 1994 which provides:

> Where no provision is made under these Rules, the procedure and practice in the Rules of the High Court 1980 shall apply.

[74] If rules from the Rules of the High Court 1980 are imported, then r 1A is also equally importable. It provides that:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[75] Taking into consideration the justice of the case as above, the fact there is no question the respondents are parties aggrieved, and the objection is merely as to the absence of the affidavit and not as to the completeness of the appeal record filed, we dismiss this ground of appeal on the dismissal of the appellant's preliminary objection.

[76] The order of the High Court in Originating Motion No R3(R2)-17–72 of 2010, upon which this appeal is founded, was made on 28 February 2011. It recorded having read the following:

> Notis usul pemula, afidavit oleh Chin Lee, memorandum rayuan, rekod rayuan, hujahan bertulis perayu [terhadap bantahan awal responden], hujahan bertulis perayu dan rangka hujahan balasan responden, afidavit jawapan responden oleh Koh Mui Tee, afidavit jawapan oleh Chin Lee, afidavit tambahan oleh Chin Lee yang kesemuanya difailkan di sini ...

[77] The High Court ordered that the penalty of RM10,000 to be paid to the discipline fund be set aside and substituted with a suspension from practice as advocate and solicitor for a period of six months from 28 March 2011.

[78] We address the other grounds of appeal pursued by the appellant under the following headings.

The respondents' appeal was as to penalty and not liability

[79] We find no merit in this ground as the respondents' appeal was to enhance the penalty handed down by the disciplinary board. There was no reason to appeal against the finding of liability.

The High Court failed to follow principles on imposition of penalty set by the Federal Court, The High Court misapplied the principle in Bolton v Law Society and/or there is no exceptional case in this case

[80] Counsel for the appellant relied upon *Trikkon Sdn Bhd v Dato Mahinder Singh Dulku (practising at Messr Mahinder Singh Dulku & (o)* [2010] 8 MLJ 239; [2008] 1 LNS 786, *Marzaini bte Zainuddin v Majlis Peguam Negara* [2007] 8 MLJ 697, *Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89, *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341, *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405. As to the purpose for which these cases were cited, it was in the direction that the High Court erred in deciding what was the more appropriate punishment as if it were the disciplinary board and not as an appeal court.

[81] We observe that in 1980 the view was that 'statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciate better than anyone else the standards which responsible legal opinion demands of its own profession'. In 1998, the view was that it was 'primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. The disciplinary tribunal of a professional body is the best judge of the seriousness of the misconduct of its members; it would require an exceptional case to enable court to interfere with its decision in respect of punishment and the test is not what the Court of Appeal or the High Court thinks should be the appropriate penalty ... The court may not substitute its own views as to what is the appropriate penalty, and affirmed the principle in *Bolton v Law Society* [1994] 1 WLR 512 that it would require an exceptional case to enable a court to interfere with their decision on the punishment. In 2007, it was held that disciplinary proceedings against recalcitrant advocates and solicitors are designed to enable members of the same profession to decide on the fate of their fellow practitioners and that this is simply because members of the same profession should know and appreciate better than anyone else the standard of conduct expected of the legal profession'. In 2010, it was held 'the courts have consistently held that it is best for the legal profession entrusted with the

supervision of advocates and solicitors to decide on the fate of its own members as members of the same profession ought to know and appraise better the conduct and standard required of their members in the legal profession in the discharge of their duties and function as an advocate and solicitor'.

[82] While it is true that the cases have thought that the disciplinary tribunals comprising members of the same profession ought to know and appraise better the conduct and standard required of their members in the legal profession in the discharge of their duties and function as an advocate and solicitor, nowhere is it suggested that the court in an appeal cannot intervene at all. These cases establish that an appellate court intervenes in an exceptional case. The High Court did not interfere with the finding of liability. But in considering the penalty imposed, it must consider it in the context of the seriousness of the case and the nature and circumstances of the misconduct. The penalty of RM10,000 imposed by the disciplinary board is a small amount to counsel of the appellant's seniority, miniscule in comparison to the fee balance claimed of RM620,000 that the appellant had in the settlement forgone. The disciplinary committee had recommended six months' suspension. We do not lose sight of the fact yet another body, the investigating tribunal recommended there was no necessity for formal investigation. Clearly, even in the light of the differing views of the investigating tribunal and the disciplinary committee, the penalty of RM10,000 is so out of proportion that it is an exceptional case for curial scrutiny and intervention.

[83] Having re-examined the case law, we concluded that the case law cautioned against the courts taking unto themselves the role of the disciplinary tribunals or boards, but nowhere is it suggested that the public interest, the protection of members of the public as clients of advocates and solicitors are to be sidelined. The courts (see *Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coin & Anor*) have a supervisory role by its curial scrutiny that the disciplinary board exercises in a balanced manner its responsibility not only for the members of the profession, but also the statutory duty to protect the public. The magnitude of the fee in relation to the work required is so disproportionate that it is unlikely the complainant would have agreed. The insertion of the 25% of market value fee in a space left blank at the time of signing, as found, without the authority of the complainant who signed the letter can hardly be termed as not dishonest. We think the High Court was circumspect in not using the word dishonesty, and we address it only because it was submitted there was no such finding. Be that as it may, a penalty of RM10,000 in the context of the misconduct found is hardly deterrent. The penalty should not be akin to a lottery, a small outgoing of payment in the event of failure, but a windfall if successful. If penalties are imposed on that basis, misconduct might become popular like the lottery.

[84] The High Court, in our view, did not proceed on a frolic of its own but elected to adopt the recommendation of the disciplinary committee. We do not find that the High Court has made any error that warrants an appellate intervention to correct.

[85] We dismiss these grounds of appeal.

The High Court had not said the disciplinary board had erred when deciding upon liability and/or ordering the penalty

[86] It is not for any party or even an appellate court to dictate how a judge must write his judgment. It would be a small further step to interference with the exercise of his judgment by a judge. We hold that unless legislation requires specific finding by the use of particular words, what the judge wrote, the context of the matter and the orders made may be read together and interpreted to disclose the findings by the judge. Clearly the judgment as a whole and the order, in the context of the appeal before it, meant the High Court found that the disciplinary board had erred in imposing a penalty of RM10,000.

The finding/decision of the High Court is inconsistent with its own decision in R3(R2)-17–75 of 2010 made on 24 February 2011

[87] On this issue, it was submitted that:

> 7.1 Dapatan/keputusan Hakim Mahkamah Tinggi bertarikh 28 Februari 2011 adalah bercanggah dengan dapatan/keputusan beliau sendiri di bawah Notis Usul Pemula Kedua tersebut [iaitu guaman yang berkaitan iaitu Notis Usul Pemula No. R3(R2)-17-75-2010] yang diputuskan lebih awal iaitu 24 Februari 2011 di mana Hakim Mahkamah Tinggi telah menyatakan bahawa 'prinsip yang diterima umum ialah mahkamah tidak akan campurtangan dalam hal-hal berkaitan disiplin peguam yang adalah lebih baik diputuskan oleh peguam sendiri.
>
> 7.2 Alasan Penghakiman Hakim Mahkamah Tinggi untuk keputusan bertarikh 24 Februari 2011 tersebut (yang menjadi subjek rayuan Perayu di bawah Rayuan Sivil No. W-02–857–2011) boleh dilihat di m/s 136 hingga 145 Ikatan Autoriti Perayu. (sila lihat khususnya m/s 144 hingga 145 untuk bahagian yang telah diungkap (*quoted part*) atau m/s 32 Rekod Rayuan yang difailkan di bawah Rayuan Sivil No. W-02–857–2011).

[88] For the reasons given above, we find no inconsistency.

The High Court's reasoning result in lack of uniformity in penalties ordered.

[89] On this issue, it was submitted that:

8.1 Tertakluk kepada Hujahan Perayu di dalam Perenggan 6.1 di atas, dan hak Perayu untuk merayu terhadap kedua-dua isu liabiliti dan hukuman, Perayu menghujah bahawa pendekatan Hakim Mahkamah Tinggi di mana beliau telah bertindak menggantikan dapatan liabiliti dan hukuman yang dijatuhkan oleh Lembaga Tatatertib dengan hukuman yang lebih berat hanya berdasarkan pendapatnya bahawa hukuman yang lebih berat itu adalah 'lebih munasabah' akan menyebabkan ketidakseragaman (inconsistency/lack of uniformity) dalam hukuman yang dijatuhkan ke atas peguam-peguam.

8.2 Terdapat lebih daripada 50 hakim-hakim Mahkamah Tinggi (termasuk pesuruhjaya-pesuruhjaya kehakiman) di 12 negeri di Semenanjung Malaysia yang semestinya mempunyai pendapat-pendapat yang tidak sama.

[90] The submission at para 8.1 does not explain what and how the alleged lack of uniformity is caused. Examining para 8.2 for a clue as what is meant, we find it merely a statement there are 50 judges of the High Court (including judicial commissioners) who must have a different opinion. Without evidence of any poll having been conducted, or if it had been conducted, when and how the poll was carried out, and where are the results, that statement is purely speculative. It warrants no consideration.

OTHER GROUNDS

[91] As to the other grounds, we do not think that the mere fact an advocate and solicitor is a sole practitioner determines that suspension cannot be imposed. We have kept in mind that the appellant had withdrawn his claim for the balance of fees, and considered it a mitigating factor. But in all the circumstances, we do not think the fact of withdrawal of the claim is such a major mitigation to warrant setting aside the order made by the High Court. If we have not made it clear enough above, we hold that penalties are confined to a small monetary term, it will not serve as a deterrence as advocates and solicitors can make a similar attempt, and escape serious penalty merely by withdrawing the claim.

[92] It was submitted that the appellant was not given opportunity to submit in mitigation. No effort was made to set-out any mitigation for our consideration. Taking into account all of the facts of the case, we find that the mitigating factor is that in the consent order of 21 April 2011, the appellant had withdrawn his claim.

[93] We, therefore, dismiss the appellant's appeal.

[94] As to the cross-appeal by the respondents, we find that the matters raised had been considered in the forums below. Below at the disciplinary level, we observe that the investigating tribunal differed from the disciplinary board

as to the need for formal investigation into the complaint, and the disciplinary board differed from the disciplinary committee only as to the punishment, but not liability. The High Court substituted the order of the disciplinary board with the penalty recommended by the disciplinary committee. For the reasons given earlier above, we do not think the punishment imposed is so manifestly inadequate as to warrant appellate intervention to increase it.

[95] We dismiss the cross-appeal. No order as to costs as agreed between parties. Deposit to be refunded to the respective parties.

Appeal dismissed.

Reported by Kanesh Sundrum